IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-7002

EUGENE L. ADAMS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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EUGENE L. ADAMS,

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v.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered March 29, 1978.

CITATIONS TO OPINIONS BELOW

The opinions of the Supreme Court of Ohio are reported at 53 Ohio St. 2d 223 and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., §1257 (3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Is the Ohio Death Statute constitutional when a burden of proof is placed upon a Defendant to prove duress in a death case and no burden of proof is placed on a Defendant to prove duress in a mere incarceration case.

2. Are Sections 2903.01, 2929.03, and 2929.04 of the Ohio Penal Code in violation of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the 5th, 6th, 8th and 14th Amendments to the United States Constitution.

2. This case involves the following provisions of Ohio law:

Ohio Revised Code, Section 2903.01. Aggravated Murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.03 of the Revised Code.

Ohio Revised Code, Section 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the, following a verdict of guilty of the charge but not guilty of each of the specifications,

the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;
(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Ohio Revised Code, Section 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or

if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender was previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character and condition of the offender one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

STATEMENT OF FACTS

This matter is on appeal from the Supreme Court of Ohio in affirming the rulings of the lower courts in finding the Petitioner guilty of aggravated murder with specifications of aggravation.

Subsequent to the affirmance of the herein conviction, a Notice of Appeal was timely filed in the United States Supreme Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief to the Ohio Supreme Court, Petitioner alleged error in affirming the lower court's refusal to strike specifications of aggravation on the grounds that the Ohio Revised Code, Sections 2903.01, 2929.03, and 2929.04 violated the 4th, 5th, 8th, and 14th Amendment to the Constitution of the United States; error in sentencing the appellant in violation of Section 2941.25 of the Ohio Revised Code; error in affirming the lower court's overruling of Petitioner's Motion to Suppress and contravention of the 4th Amendment of the United States Constitution; error in affirming the lower court's refusal to grant a new trial after the jury rendered its verdict: and lastly, error in affirming the lower court's refusal to grant a new trial after the testimony of a polic officer that the Defendnat was on parole. Each of these allegations was specifically rejected.

REASONS FOR GRANTING THE WRIT

1. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER SECTIONS 2903.01, 2929.03 AND 2929.04 OF THE OHIO PENAL CODE PERMIT ARBITRARY IMPOSITION OF THE PUNISHMENT OF DEATH IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

In July of 1972 the Supreme Court of the United States held that the death penalty could not be imposed or carried out under statutory schemes which permit arbitrary, rare and discriminatory application. Furman v. Georgia 408 U. S. 38 (1972). Two of the five majority justices found the death penalty unconstitutional per se. The remaining three justices based their holdings upon the sentencing discretion conferred by the typical pre-Furman capital punishment statute and did not decide whether the removal of sentencing discretion, or the removal or control of discretion at other stages of the capital trial process, would sufficiently regularize the imposition of capital punishment to satisfy constitutional standards against arbitrariness, rarity and discrimination in infliction of the punishment of death.

By enactments effective January 1, 1974, the Ohio Legislature provided new capital punishment measures that defined a category of murder cases in which the penalty is potentially applicable that purport to regulate the process by which sentence is determined in cases of capital murder. But the conclusion is inescapable that, under this new legislation, the death penalty does and will continue to be imposed in an arbitrary, rare and discriminatory manner. It is, hence, unconstitutional under the terms of the Furman decision. (See Sections 2903.01, 2929.02, 2929.03, 2929.04 of the Ohio Revised Code.)

A close review of the aforementioned legislation indicates that persons who commit capital murder may be sentenced to death or life imprisonment depending upon the outcome of

several decision-making processes. Some of these decisions are made on a discretionary basis. Others are made under the disguise of resolving subjective and conclusionary questions which function - and are intended to function - to mask the true, discretionary character of the decision-making.

Examples of this, under the new legislation, are the exercise of prosecutorial discretion, plea bargaining, jury discretion, and sentencing discretion. Although it is clear that Furman directed itself primarily to sentencing discretion, it is apparent that pre-sentence and post-sentence discretion can operate just as well to make the eventual imposition of capital punishment arbitrary and capricious. This decision has been reached in two states where courts have so held and have, therefore, invalidated supposedly mandatory death sentencing statutes on the authority of Furman. In Commonwealth v. A Juvenile (1973) Mass. Adv.Sh. 1199, 300 N.E. 2d 434 (1973), a death penalty imposed pursuant to a statute which required its imposition upon a conviction of a rape-murder was reversed because the trial judge had absolute discretion to avoid the penalty by proceeding against the Defendant under the Massachusetts Juvenile Offender Statutes. In New Mexico it was held in State v. Sanford (No. 24022 Cr., Bernalilla County) that a death penalty could not "lawfully be imposed, even if it were mandatory upon conviction of first degree murder, if "indictment would allow the jury to choose between first or second degree murder" because the jury would thereby be "allowed to arbitrarily decide whether a defendant shall receive the death penalty by choosing either first or second degree murder."

Similarly, the Ohio legislation is defective for the reason that the legislation has failed even to make an attempt to regular discretion operating in an arbitraty manner and with equal or greater effect before and after the imposition of sentence.

As to prosecutorial discretion, "the prosecutor is the real arbiter of what laws shall be enforced and against whom, while the attention of the public is drawn rather to the small percentage of offenders who go through the courts." (National Commission on Law Observance and Enforcement, Report on Prosecution (1931). The impact of prosecutorial discretion on the administration of criminal justice is unbounded:

> " Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."
> (Note, Prosecutorial Discretion 21 DePaul L. Rev. 485, 486 (1971-1972)

Thus, without any legislative guidance whatsoever, a prosecutor may make case-by-case decisions as to whether an indictment will be sought for aggravated murder or for a lesser crime. Thus, since prosecutorial discretion is unlimited in Ohio there is no safeguard against the possibility that defendants will be charged with capital murder while other defendants, in identical or near identical factual situations, are charged with a lesser offense. (ORC Section 309.08)

In addition, Sections 2929.03 and 2929.04 introduce an entirely new and equally unregulated level of prosecutorial discretion by providing that the death penalty may only be imposed if the prosecutor has chosen to specify in an indicement charging aggravated murder that one of the seven conditions enumerated in Section 2929.04 was present. Absent such a specification, no death sentence is possible regardless of the facts proved at trial; yet no rule of law and no amount of evidence places a prosecutor under any duty to allege or prove such a condition. It is, therefore, possible for a prosecutor to try an alleged murderer for the highest degree of the crime, but to choose, for any reason at all, or for no reason at all, not to seek a death penalty.

Even if the initial charging discretion of prosecuting attorneys were somehow regularized, their power to avoid the death penalty by accepting a plea of guilty or no contest to a lesser included offense or to aggravated murder without specified aggravating circumstances would remain unchecked. See Rule 11 (C) (4) of the Rules of Criminal Procedure which provide that "if the indictment contains one or more specifications, and a plea of guilty or no contest to the charges accepted, the Court may dismiss specifications and impose sentence accordingly in the interests of justice." The prosecutor and judge are thus given absolute discretion to avoid the death penalty since that penalty is prohibited in the absence of a plea or judicial finding of one or more specifications. Under 48 (A) of the Rules of Criminal Procedure the prosecuting attorney may exercise the same discretion by obtaining, with permission of the Court, a dismissal of all or part of the indictment. Thus, it becomes inevitable that in the absence of any standards which would prevent a prosecuting attorney from accepting a guilty plea to a lesser charge, some defendants indicated under the Ohio Capital Punishment Statutes will escape through plea-bargaining, the ultimate penalty of death.

The third area where discretion is exercises is through the jury process. Juries have traditionally avoided the death penalty by convicting defendants of lesser, rather than capital offenses. Indeed,, American juries called upon to determine cases which the death penalty was mandatory upon conviction have frequently refused, despite strong evidence of guilt, to return a guilty verdict with regard to the capital offense. See McGautha v. California 402 U.S. 183, at 199 (1971), and authorities cited therein. The new death penalty provisions of the Ohio Criminal Code do nothing to regularize pre-existing jury discretion to convict a capital defendant of a lesser offense. Moreover, they offer the jury the additional opportunity to avoid the death penalty by finding the the defendant guilty of aggravated murder but failing to find that the offense involved, a specified aggravating condition.

Any of seven circumstances will, if found by the jury to have existed beyond a reasonable doubt, serve to elevate a crime from the category of simple aggravated murder (carrying a maximum penalty of life imprisonment) to the category of capital murder (punishable by life imprisonment or death). These seven circumstances are decidedly more susceptible of objective determination than the mitigating circumstances enumerated in Section 2929.04 (B), yet each is an invitation to a jury opposed to the execution of the defendant before it to remove the capital punishment alternative by failing to find the presence of a specified aggravating circumstance.

This new opportunity for discretion embellishes a system in which the opportunity of convicting a capital defendant of a lesser offense is clearly available (R.C, SEction 2945.74).

The last area of discretion to be discussed and the plainest result of Furman is that sentencing discretion may new be exercised to impose the death penalty upon some, but not all persons found to have committed capital crimes. The post-Furman Ohio statutes provide that even after a defendant found to have committed an aggravated murder under one of the seven conditions specified as prerequisite to the imposition of the death penalty, the trial judge may sentence him to death or to life imprisonment depending upon a determination of three highly subjective questions of degree, none of which can be precisely proven. These mitigating circumstances as they are called, are so imprecise that they assure absolute sentencing discretion by providing a rationale for the choice of either sentencing alternative in almost any capital case.

In Gregg v. Georgia, 44 U.S.L.W. 5230 (July 2, 1976); Proffitt v. Florida, 44 U.S.L.W. 5256 (July 2, 1976); Jurek v. Texas, 44 U.S.L.W. 5262 (July 2, 1976); Woodson v. North Carolina, 44 U.S.L.W. 5267 (July 2, 1976; and Roberts v. Louisiana, 44 U.S.L'W. 5281 (July 2, 1976), the Supreme Court of the United States considered the per se constitutionality of capital punishment and decided that "the punishment of death does not invariably violate the Constitution," Gregg v. Georgia, supra, 44 U.S.L.W. at 5234. In so doing, it rejected petitioners' contention that support for the death penalty had so dwindled that its imposition in a predictably small number of scattered cases would be an impermissible cruelty. The Court acknowledged that "under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers," Woodson v. North Carolina, supra, 44 U.S.L.W. at 5272, and held that, even where the death penalty was limited to a narrower category of homicides, its across the board imposition, without regard for "the circumstances of the particular offense and the character and propensities of the offender" involved "harshness and inflexibility,"

Roberts v. Louisiana, supra, 44 U.S.L.W. at 5283, that were inconsistent with contemporary morality as evidenced by legislative enactments and the behavior of capital juries. But it took the position that where the attention of the sentencing body is focused upon both aggravating and mitigating factors, and where appellate review of capital sentences is available as an assurance against disproportionality, Gregg v. Georgia, supra, 44 U.S.L.W. at 5243, see also Proffitt v. Florida, supra, 44 U.S.L.W. at 5259; Jurek v. Texas, supra, 44 U.S.L.W. at 5266, a " 'meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not,' " -- a factor found decisively lacking in Furman v. Georgia, 408 U.S. 238 (1972) -- would be achieved. Gregg v. Georgia, supra, 44 U.S.L.W. at 5244.

12.

The decisions in Gregg, et al. rest, then, on the assumptions that (1) contemporary levels of support for the death penalty are not so low that its use will be necessarily aberrational, and (2) as standards of decency evolve, legislative patterns permitting or mandating lesser penalties in formerly capital cases and patterns of jury behavior in capital cases will emerge, providing rational bases for identifying systems that are excessively rigid and sentences that are disproportionately harsh.

Furman v. Georgia, due to its complexity, has been applied in Ohio capital cases to severely limit mitigating circumstances. These rigid features of the Ohio Statute are clearly inconsistent with legislative will and therefore are in violation of the consitutional rationale of Gregg, et al.

Woodson v. North Carolina, supra, and Roberts v. Louisiana, supra, hold that contemporary standards of decency, incorporated in the Eighth Amendment, require "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death" and forbid "treat(ing) all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death," Woodson v. North Carolina, supra, 44 U.S.L.W. at 5274. Moreover, they establish that recent legislative enactments of statutes allowing rigid, automatic application of the death penalty reflect "attempts by the States to retain the death penalty in a form consistent with the Constitution," rather than "a renewed societal acceptance" of Draconian infliction capital punishment.

Examination of the Ohio death penalty statutes and the history of their enactment establishes that they, like the statutes invalidated in Woodson and Roberts, are more rigid than contemporary standards of decency can condone and reflective, not of the will of the people of the State of Ohio as expressed through its legislature, but of a compromise between humane policy concerns and the supposed requirements of Furman.

Following Furman, 21 of 35 states that enacted new sentencing provisions made death the mandatory consequence of a finding that a defendant was guilty of certain criminal conduct. The federal government and 11 states enacted statutes following the example of the Model Penal Code of 1962 in that they directed consideration of aggravating and mitigating circumstances in the process of determining sentence in a capital case. These twelve jurisdictions, finding the mandatory scheme too harsh, choose to focus sentencing deliverations upon a broad range of mitigating factors. The mitigating factors considered in the sentencing process in these twelve jurisdictions invariably include, as they must, in light of the Woodson and Roberts holdings, factors having to do with "the character and record" of the defendant whose life is at stake. In the herein case, it is particularly significant that the Appellant is an acknowledged sociopath and of sub-standard intelligence.

Following Furman, 21 of 35 states that enacted new sentencing provisions made death the mandatory consequence of a finding that a defendant was guilty of certain criminal conduct. The federal government and 11 states enacted statutes following the example of the Model Penal Code of 1962 in that they directed consideration of aggravating and mitigating circumstances in the process of determining sentence in a capital case. These twelve jurisdictions, finding the mandatory scheme too harsh, choose to focus sentencing deliberations upon a broad range of mitigating factors. The mitigating factors considered in the sentencing process in these twelve jurisdictions invariably include, as they must, in light of the Woodson and Roberts holdings, factors

having to do with "the character and record" of the defendant whose life is at stake.

In Alabama, Arkansas, Florida and Nebraska, a broad range of mental and emotional disturbance may be considered as a mitigating factor. Ala. H.B. 212 Sec. 7 (b); Ark. Code Sec. 41-4712 (a); Fla. Stat. Ann. Sec. 921.141 (7) (b); Neb. Rev. Stat. Sec. 92-2523 (2) (b) and (c). And limitations in the capacity of the defendant to regulate or appreciate the wrongfulness of his conduct are mitigating in Alabama, Arizona, Arkansas, Connecticut, Florida and Nebraska and in Federal jurisdictions and preclude imposition of a death sentence in Colorado. In Ohio, sentencing determinations in capital cases were taken from the jury and all mitigating factors having to do with the character and background of the offender were elimirnated, save one:

> "The offense was primarily the product of the offender's psychosis or mental deficiency...."

Ohio Rev. Code Sec. 2929.04 (B) (3). The terms "psychosis" and mental deficiency" designate narrow categories of mental illness and exclude most recognized mental and emotional distrubances. This rigid standard violates the principals that not "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender," see Roberts v. Louisiana, and that "individual culpability is not always measured by the category of crime committed," and thus infringes the constitutions of the United States and the State of Ohio. Since mitigating evidence is irrelevant to the Ohio sentencing determination, except as it establishes the inducement, duress, cohersion, strong provocation or causily related psychosis or mental deficiency that must be found to have inhered in the crime before a defendant may be spared, and since there is no mitigating factor that looks exclusively to the propensities and redeemability of the individual offender, the Ohio statute precludes the independent "consideration of the character and record of the individual" that is "a constitutionally indispensable part of the process of inflicting the penalty of death, "Woodson v. North Carolina, 44 U.S.L.W. at 5275.

The Ohio Death Penalty statutes violate the Sixth, Eighth, and Fourteenth Amendments in that they deny the capitally accused the right to a judgment of his peers as to the existence of mitigating circumstances, and the appropriateness of the penalty of death. Prior to Furman v. Georgia, 408 U.S. 238 (1972), it was almost universal in America that "infliction of the death penalty" be put "in the hands of the jury, rather than the judge." McElroy v. United States, 361 U. S. 249, 255 (1960). In fact, "except for four states that entirely abolished capital punishment in the middle of teh last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." McGautha v. California, 402 U. S. 183, 200 n. 11 (1971).

In Ohio, jury discretion in capital sentencing prevailed from 1898 without interruption until the death penalty statutes of this state were invalidated in 1972. This undoubtedly was the result of language in Furman ruling that unbridled jury discretion to impose a death sentence was constitutionally prohibited and the opinion of the supreme Court in McGautha, that the formulation of standards to guide juries in capital sentencing process was impossible.

The United States Supreme Court has not conceded that "McGautha's assumption that it is not possible to devise standards to guide and regularized jury sentencing in capital cases has been undermined by subsequent experience." Gregg v. Georgia 44 U.S.L.W. 5230, 5242 (1976).

Although it may be permissable to permit trial judges to reduce death sentences imposed under the influence of passion or prejudice or against the weight of aggravating and mitigating evidence, the imposition of a death penalty under a procedure which affords no opportunity for meaningful jury input is, on three independent grounds, violative of the Ohio and Federal constitutions. First, the principle that Death Sentences may only be imposed by a jury is fundamental to our jurisprudence and as essential assurance against disproportionality and excessiveness in capital sentencing. Second, the failure to provide for jury input in the capital sentencing process will result in the impermissably arbitrary imposition of the death penalty. Third, findings regarding the presence or absence of mitigating circumstances are findings of fact as to which a defendant has a Sixth Amendment right to a trial by jury.

The final argument to be asserted by the Defendant-Appellant as to the unconstitutionality of the death penalty is that to execute the Defendant-Appellant is cruel and unusual punishment as prohibited in the Eighth Amendment of the United States Constitution. The landmark case of Jordan v. Fitzharris 257 Fed. Supp. (1964), lists among other things that a punishment is cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim. Further, a punishment is unnecessarily cruel when it goes beyond the purpose for which it is used. In People v. Mosely, 15 Crim. Law, 2503, a recent New York State decision, the life sentence of a person convicted of selling narcotics was reversed as cruel and unusual punishment based upon a comparison with the punishments accorded similar crimes in other jurisdictions and the recommended penalty of model legislation. Following this decision, this Court is respectfully requested

to compare the pertinent Ohio Statutes to those of New York, California, Rhode Island and Massachusetts.

In the foregoing we have shown that the new capital sentencing procedure created by the new Ohio Legislature creates the jury selectivity which is condemned by Furman v. Georgia. Even if this were not so, the Eighth Amendment would prohibit Defendant-Appellant's death sentence, for today the death penalty, in any form, is inconsistent with the self-respect of a civilized people.

The Eighth Amendment is not static, and the prohibitions of the cruel and unusual punishment clause are not "confined to such penalties and punishments as were inflicted by the Stuarts. Weems vs. United States 217 U.S., 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." id at 378, and informed by "the light of contemporary human knowledge." Robinson vs. California 370 U.S. 660, 666 (1962). The penalty of death is, for three principal reasons, unjustifiable in terms of contemporary knowledge and standards of decency.

FIRST: The cruelty of the death penalty is apparent in an age when "contemporary human knowledge" draws upon advance medical science and sciences of human behavior. We are no longer so naive as to the workings of anti-social behavior as to uphold the simplistic notion that the threat of death deters crime, e.g. Sellin, Capital Punishment (1967) 135-186, 244-253; Mattick, The Unexamined Death (1966) 28-80; Bedau, The Death Penalty in America, Rev. ed 1967 214, 258-343, Royal Commission on Capital Punishment, 1949-1953 Report (H.M.S.O. 1953) at 18-24, 58-59, 328-380; President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society) (1967) 143.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, to reinforce moral standards or, if retribution is considered a legitimate aim of penal sanction to exact a civilized society's measure of justice then it is surely impossible for any governmental organ to justify the decision to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human-life." Black, Crisis in Capital Punishment, 31 MD. L. Rev. 289-291 (1971) The death penalty is not consistent with any "standards of decency that our society can forthrightly accept." See Trop v. Dulles, 356 U.S. 86, 100 (1958).

SECOND: The death penalty should be repudiated because of its irregular and rare use. "The most salient characteristic of capital punishment is that it is infrequently applied... All available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society)(1967), p. 143. No man or woman has been executed in the United States of America since 1967.

The Furman majority looked to what the public conscience will allow the law to do, as opposed to what it will permit the Law to threaten. In the words of Mr. Justice Brennan, "the objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U.S. at 300.

THIRD: The last and most obvious argument to be propounded against the application of the death penalty as

violative of the Eighth Amendment of the United States Constitution is well stated in People v. Anderson, 6 CAL 3rd, 628, 493, P. 2d 880, 894 (1972). In this case it was pointed out, that "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture. It is plain that the prisoner, even more than the expatriot, is subjected to 'a fate of ever-increasing fear and distress.' "Trop v. Dulles, 356 U. S. 86, 102 (1958). The stress of awaiting execution frequently produces insanity; see Solesbee v. Balcome, 339 U.S. 914 (1950), or other extreme manifestations of psychological complications.

To summarize, the moral development which has accompanied advances in understanding the causes of crime and which is mirrored in the world-wife reluctance to impose the ultimate penalty, forbids its continued approval by courts constrained to maintain "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100 (1958).

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONERS' DUE PROCESS RIGHTS WERE VIOLATED BY INTRODUCTION OF "OTHER ACT TESTIMONY AND IF THIS CONSTITUTED ERROR, WAS THAT ERROR HARMLESS.

The Ohio Supreme Court responded as follows to petitioner's complaint regarding the introduction of testimony which implied the petitioner was involved in prior criminal conduct:

> Appellant's sixth and final contention is that the trial court erred in admitting certain testimony which implied that appellant was on parole. Other testimony had shown that the defendant left Columbus, where the shooting occurred, and went to Cincinnati just after the crime, and that he was later apprehended in New Orleans. After he had been taken into custody, and having been advised of his rights, he voluntarily gave the police a statement to explain his departure from Columbus. The officer who received the statement related the content of the statement at trial, and part of his testimony reads as follows:
>
> "Q. Now, Detective Jones, I will repeat the last statement. Did you ask Mr. Adams why he left Columbus?
>
> "A. Yes, sir.
>
> "Q. And what is his response to that question?
>
> "A. He went to Cincinnati because his parole officer did not know he was in the Columbus area.
>
> "Mr. Tsitouris: For the record, Your Honor, we will object to the answer.
>
> "The Court: Overruled.
>
> "Q. (By Mr. Miller) And I missed the end. His parole officer did not know he was in Columbus and what--or was that the end?
>
> "A. Yes, sir."
>
> This testimony suggested to the jury that the appellant had been convicted earlier of another criminal offense. Although other crimes may be shown for some purposes, "(a)s a general rule, the introduction of evidence tending to show that a defendant has committed another crime wholly independent of the offense for which he is on trial is prohibited." State v. Hector (1969), 19 Ohio St. 2d 167, 249 N. E. 2d 912; State v. Burson (1974), 38 Ohio St. 2d 157, 311 N.E. 2d 526; State v. Curry (1975), 43 Ohio St. 2d 66, 330 N.E. 2d 720; State v. Lytle (1976), 48 Ohio St. 2d 391, 358 N.E. 2d 623. In the present case, the prosecutor could have had no reason for offering the quoted testimony except to impugn the defendant's character generally; and "(u)nless the accused asserts his own good character and offers testimony tending to prove it, it is never competent for the state to offer evidence of his general bad character or reputation." Whiteman v. State (1928), 119 Ohio St. 285, 289, 164 N.E. 51.

> Therefore, the trial court erred in overruling appellant's objection.
>
> Inasmuch as "(e)rror in the admission of other act testimony is harmless when there is no reasonable possibility that the testimony contributed to the accused's conviction." (State v. Lytle, supra, paragraph three of the syllabus), consideration must be given to whether the rror in the admission of that evidence here warrants reversal. An examination of the record leads this court to the conclusion that appellant's right to a fair trial was not prejudiced by the admission of the "other act testimony" and that the error in its admission was harmless beyond a reasonable doubt. Chapman v. California (1967), 386, U.S. 18.
>
> The judgment of the Court of Appeals is affirmed.

It is extremely difficult to conceive how in an aggravated murder case, with death specifications, the prosecutor's conduct could be deemed harmless. It must be noted that this evidence was presented at the end of the prosecutions case-in-chief, at a point just prior to the resting of its case.

In Michelson v. United States, 335 U.S. 469, (1948) this court stated:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character ... but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

The law in the State of Ohio, as pointed out by the Ohio Supreme Court, is stated in State v. Hector, 19 Ohio St. 2d 167 (1969). "As a general rule, the introduction of evidence tending to show that a defendant has committed other crimes wholly independent of the offense for which he is on trial, is prohibited.

Based on this pronouncement there can be no doubt that error was created. However, in light of Chapman v. California, 386 U.S. 18, the Court held that since the error in admitting the evidence was harmless beyond a reasonable doubt, after a review of the record the error did not prejudice any rights of the petitioner.

This Court has said certain constitutional guarantees are protected and a violation of a fundamental constitutional guarantee is grounds for reversal of a conviction. It is here urged that the errorenous admission of evidence of prior criminal conduct or other act testimony, "in a criminal case where the penalty is the death sentence, is as prejudical to the petitioner's right to a fair trial as would be denying that person assistance of counsel.

It seems that to categorize some constitutional rights as fundamental and automatically reverse for violation thereof and on the other hand determine that other rights can be weighed against the other evidence to determine whether or not violation is prejudical, is an inequity that should not be followed.

The prejudical effect is especially great in a capital trial, for "the danger resulting from prejudice is always enhanced in a capital trial: passions are high and the penalty is irreversible." United States ex rel. Scoleri v. Ramsiller, 310 F. 2d 720, 724 (CA 3 1962).

In the present case, taking all of the evidence into consideration, had the prosecutor commented on the refusal of the defendant to testify, a reversal would have granted at a lower appellate level. It is conceivable that it could be effectively argued under the present law that based on the other evidence, this act is viewed as harmless error beyond a reasonable doubt. However, since the error effected a fundamental constitutional

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right of the defendant, a reversal would be in order. How the, can the injection of testimony of other criminal conduct be deemed not a fundamental right and the violation thereof be a denial of the defendant's constitutional due process right.

To say that, based on the entire record this is harmless error and cannot reasonably be possible that this evidence would contribute to the conviction, seems totally irreconsiable with the position taken on other errors committed at the trial level warranty reversal.

In addition, it should be noted that this introduction was not a result of mistake or negligence, but rather an attempt of an over zealous prosecutor to obtain a conviction and a death penalty. In Berger v. United States, 295 U.S. 78, 88 (1935) the Court stated, that a prosecutor:

> "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones."

To do so is thus a violation of the fundamental fairness guaranteed by the Due Process Clause and is thereby prejudicial error as opposed to harmless error.

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III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONERS DUE PROCESS RIGHTS WERE VIOLATED BY THE RENDITION OF THE JURY OF INCONSISTENT VERDICTS.

The defendant in this case was indicted under Section 2911.01 of the Ohio Revised Code charging him with one count of aggravated robbery. In addition, he was indicted under Section 2903.01 of the Ohio Revised Code charging him with one count of aggravated murder. To the second count of the indictment pursuant to Section 2941.44 of the Ohio Revised Code, a specification was added to the second count under Section 2929.04 (A) (7) of the Revised Code. This specification charged that the defendant committed the offense of murder while the defendant was committing, attempting to commit or fleeing immediately after attempting to commit aggravated robbery. These were the only two counts in the indictment and there was but one specification included.

At the conclusion of the trial and instructions by the Court, the jury returned a verdict of not guilty as to count one, and guilty as to count two with the specificaton included. To this the defendant appealed citing the inconsistent verdicts as a basis.

The Court of Appeals and Ohio Supreme Court discounted this proposition citing the rule in Ohio in the case of Griffin v. State 120 Ohio St. 62: and State v. Mellent 143 Ohio State 39. In addition, the Ohio Supreme Court cited the general rule expressed in 18 A.L.R. 3rd 259 and based on the decision in Dunn v. United States, 284 U.S. 390, 76 L. ed. 356, 52 S. Ct. 189 (1932).

Regardless of the decisions propounded in these and other cases on the question of inconsistent verdicts, the petitioner submits that these cases are factually distinguishable and that the courts must look to the particular offenses charged

and facts presented in order to determine whether or not inconsistent verdicts create an injustice.

In the case of State v. McNicol, supra, the Ohio Supreme Court stated,

> "Jury verdicts in criminal cases are to have reasonable constructions and are not to be declared void unless from necessity originating in doubt of their import or irresponsiveness to the issue submitted or unless they show a manifest tendency work injustice."

Taking this pronouncement in reverse it appears that jury verdicts should be declared void if they are irresponsive to the issues submitted or they show a manifest tendency toward injustice. Applying this to the factual basis of the verdict in this case, petitioner suggests that a finding of not guilty of aggravated robbery and guilty of murder during the commission of the same aggravated robbery is both irresponsive and injust. The evidence upon which the jury made these findings was identical. Nothing additional was presented by the State on the second count. Yet the determination was that there was insufficient evidence to make a finding of guilty on the first count. This then the petitioner argues makes a finding of guilty of murder while in the commission of an aggravated robbery totally unresponsive to the issues presented.

While the petitioner recognizes the weight of authority does not adher to this theory, several courts required juries to justify their verdicts where the acquittal and conviction are based on the same evidence. In Speiller v. U.S., 31 F. 2d 682, the Court stated, "where a jury acquits on one count and another count charging the same crime, the conviction cannot stand without other evidence than on which the acquittal was based."

This approach recognizes the necessity for logic and reason in the obligation of jurors in criminal cases. And as pointed out in Speiller v. United States, supra, when the liberty of a citizen is at stake a jury should be required to allow [illegible] and cold."

Subsequently the case of U.S. v. Bethea, 483 F. 2d 1024, determined that an acquital of one count of an indictment that is an essential element in a subsequent indictment, negates those elements and a conviction on these subsequent counts must be overturned.

The applicability of the rules in these two cases are in line with the present case since unlike the several other decisions, this case has the exact elements necessary to convict, all in one count and part in the second count, but different verdicts. To view the two counts as separate indictments and to treat them independently when they are based one one set of facts is unjust.

The responses to the counts in this case are imminently appropriate for consideration based on the total inconsistencies. It seems totally unjust to acquit a person of a charge of aggravated robbery and on the same facts convict of murder while in commission of the same robbery of which he was acquitted of.

In addition, petitioner urges that aside from the general state of decision on the question of inconsistent verdicts, the facts in this case and the verdicts rendered based on those facts and the law are totally illogical and thus repugnant and should therefore be set aside.

IV. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONERS DUE PROCESS RIGHTS WERE VIOLATED BY PUBLICITY DURING THE PROCEEDINGS THAT FORCED THE EXCLUSION OF TWO JURORS.

During the course of this trial a local newspaper reported a story in its February 7, 1976, edition, that the daughter of the deceased, identified the defendant in open Court. In reality, the testimony was made during voir dire examination out of the hearing of the jury. Following this article, counsel for defendant requested that the jury be polled to determine whether any juror had read the article. As a result, two jurors were excused. Prior to this episode of the trial the trial court explained the purpose and reiterated its failure to instruct the jury not to read newspapers regarding this trial.

At the conclusion of the trial, defendant's motion for new trial was overruled. This decision was affirmed by the Court of Appeals and the Ohio Supreme Court. The basis of these decisions was that the excusal of the two jurors and the fact that the two jurors had not communicated to the other jurors what they had read cured any possible error and protected the defendant's right to fair trial.

The petitioner urges that this publicity and subsequent action by the trial court resulting therefrom is the very substance of the decision by this Court in Shepard v. Maxwell, 86 S. Ct. 1507, that dealth with publicity during and prior to a criminal trial. It was noted in this decision that,

> "If publicity during the proceedings threaten fairness of the trial, a new trial should be ordered."

The publicity during the trial of this case was certainly not the normal reporting of a homicide trial. The result was a disrupting event during the trial that caused the

exclusion of two jurors and the subjection of the others to implications of prejudicial material. A fundamental principle of the criminal system is that jurors are to be free from bias and undue influence in deciding a case. Certainly the effects of this publicity cast some doubt on the position of the defendant, if not directly, then certainly by implication. The result was a threat to the fairness in the trial proceedings.

While the Ohio Supreme Court, discarded this argument by saying the remaining jurors were not aware of the substance of the story and therefore the defnedant's rights were protected it was plain in Sheppard v. Maxwell, supra, that the question is not whether the jury actually read the newspaper account but rather that the publicity was such that it served to create possible bias or prejudice in the trial of the case.

This the petitioner urges was the effect during the present case. A fundamental principle was violated which potentially removed the concept of fairness during the trial. And, certainly when the indictment charges a capital offense and the penalty is so severe, the protection of the defendant's right to a trial free from bias and prejudice are mandatory.

CONCLUSION

Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

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Appendix A

The Opinion of the Court in State v Adams, 53 Ohio St.2d, 223 has not been reproduced.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-7002

EUGENE L. ADAMS,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-7002

EUGENE L. ADAMS,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI

Opinions Below

The opinion below is adequately set forth in the petition and is reported in 53 Ohio St. 2d 223 (1978).

Jurisdiction

Jurisdiction is adequately set forth in the petition, being invoked under Title 28, United States Code, Section 1257(3).

Questions Presented for Review

I. THE QUESTION OF WHETHER A PROPER PROCEDURE IS FOLLOWED BY THE OHIO STATUTORY SCHEME FOR IMPOSITION OF THE DEATH PENALTY HAS BEEN DECIDED BY THIS COURT IN LOCKETT V. OHIO, 438 U.S. _____ (1978).

II. WHERE PROOF OF GUILT IS OVERWHELMING, DOES TESTIMONY THAT AN ARRESTEE'S STATEMENT TO POLICE INCLUDED REFERENCE TO THE ARRESTEE BEING ON PAROLE, CONSTITUTE REVERSIBLE ERROR, OR IS SUCH ERROR HARMLESS BEYOND A REASONABLE DOUBT?

III. DOES THE DUE PROCESS CLAUSE REQUIRE CONSISTENCY IN VERDICTS BETWEEN SEPARATE COUNTS OF A MULTIPLE COUNT CRIMINAL INDICTMENT?

IV. DOES A NEWSPAPER ACCOUNT OF TRIAL PROCEEDINGS READ BY ONE JUROR IN A CRIMINAL CASE BUT NOT BY OTHER PANEL MEMBERS, REQUIRE A MISTRIAL OR MAY SUCH JUROR BE REPLACED BY AN ALTERNATE JUROR?

Statement of the Case

Petitioner was indicted by the Franklin County, Ohio, grand jury on one count of aggravated murder, the purposeful killing of another while in the course of an aggravated robbery, in violation of Ohio Revised Code Section 2903.01. Also charged in the indictment was aggravated robbery, Ohio Revised Code Section 2911.01.

After trial by jury in February 1976, petitioner was found guilty of the charge of aggravated murder and sentenced to death pursuant to Ohio Revised Code Sections 2929.02 through 2929.04.

The offense occurred the evening of September 13, 1975. Marlyn J. Darst, a clerk at "Wally's Carry-Out" was shot to death during an aggravated robbery of that store. Her ten-year-old daughter entered the store and saw her mother, who was lying on the floor, kick at a man who then shot Mrs. Darst twice with a gun.

Petitioner had altered both the color and style of his hair between the time of the murder and the trial and the witness was unable to identify him at trial. However, she did identify a photograph of petitioner from a group of six shown to her by police several days after the murder. She again picked that photograph in court. She identified a jacket as worn by the gunman. Other witnesses identified the jacket as worn by petitioner the night of the murders.

Three witnesses saw the assailant enter a getaway car. All descriptions of the vehicle were in agreement.

The day before the murder, David West rode to Lake Erie in a car which matched the description of the getaway car. With him were Tommy Deal (a co-defendant of petitioner), Margaret Etter and petitioner.

Having spent the night at Lake Erie, West testified that the party returned to Columbus, Ohio, on the evening of the following day. As they reached Columbus, petitioner "said something about hitting a place on High Street." (The store which was robbed and where the deceased was murdered is

located on South High Street). Petitioner and Deal left West and Etter at the home of West's sister. Both men left the house and returned shortly thereafter. West overheard petitioner admit he had shot a woman three times.

Margaret Etter testified petitioner was nervous and pale and that petitioner stated he shot the woman because she had kicked him. West's sister also testified that petitioner admitted shooting a woman.

Etter, West and Deal then took petitioner to Cincinnati, Ohio. Etter testified that during the trip, petitioner explained again that he had shot the woman because she kicked him and that a child had been present.

West testified that after leaving petitioner in Cincinnati, Etter and Deal then drove to Lake Erie "to go get an alibi." Upon return to Columbus, they stopped at West's home and were immediately confronted by Columbus police who arrested Deal and in searching the car, found a pistol under the seat. The parties stipulated that ballistics testimony would be that the bullets removed from the victim's body were fired from that gun.

Following jury trial, petitioner was found guilty. After a mitigation hearing, petitioner was sentenced to death. Full appellate review of both the conviction and sentence was accorded as a matter of right by both the Ohio Court of Appeals and the Ohio Supreme Court. At each level, the conviction was affirmed by unanimous decision. Petitioner now seeks a Writ of Certiorari from this Court.

Summary of Argument

I. IN LIGHT OF THE DECISION OF THIS COURT IN LOCKETT V. OHIO, 438 U.S. _____ (1978), THE PETITION SHOULD BE GRANTED AND JUDGMENT VACATED INSOFAR AS IT LEAVES UNDISTURBED THE DEATH PENALTY IMPOSED AND THE CASE REMANDED TO THE SUPREME COURT OF OHIO FOR FURTHER PROCEEDINGS.

II. WHERE PROOF OF GUILT IS OVERWHELMING, THE REPETITION AT TRIAL BY A POLICE OFFICER THAT AN ARRESTEE'S STATEMENT INCLUDED A REFERENCE TO THE ARRESTEE BEING ON PAROLE, DOES NOT CONSTITUTE REVERSIBLE ERROR AND IS HARMLESS BEYOND A REASONABLE DOUBT.

III. CONSISTENCY BETWEEN VERDICTS ON THE SEVERAL COUNTS OF AN INDICTMENT IS UNNECESSARY WHERE A DEFENDANT IS CONVICTED ON ONE OR SOME COUNTS BUT ACQUITTED ON OTHERS.

IV. EXCUSAL AND REPLACEMENT OF A JUROR WHO HAS READ A NEWSPAPER ACCOUNT OF A CRIMINAL TRIAL PROCEEDING DOES NOT CONSTITUTE ERROR. WHERE IN A VOIR DIRE INQUIRY THE TRIAL COURT DETERMINES THAT THE BALANCE OF THE PANEL HAD NOT READ THE NEWS ACCOUNT AND THE EXCUSED JUROR HAD NOT COMMUNICATED THE NEWS ACCOUNT TO OTHER PANEL MEMBERS, SUBSTITUTION OF AN ALTERNATE JUROR WHO HAD NOT READ THE NEWS ACCOUNT IS PROPER.

I. IN LIGHT OF THE DECISION OF THIS COURT IN LOCKETT V. OHIO, 433 U.S. _____ (1978) THE PETITION SHOULD BE GRANTED AND JUDGMENT VACATED INSOFAR AS IT LEAVES UNDISTURBED THE DEATH PENALTY IMPOSED AND THE CASE REMANDED TO THE SUPREME COURT OF OHIO FOR FURTHER PROCEEDINGS.

II. WHERE A DEFENDANT IN A CRIMINAL TRIAL VOLUNTARILY MAKES STATEMENTS TO THE POLICE WHICH ARE DESIGNED TO BE EXCULPATORY IN THE INVESTIGATIVE STATE OF THE PROCEEDINGS, SUCH STATEMENTS ARE ADMISSIBLE AT TRIAL, NOTWITHSTANDING THE FACT THAT IN A LATTER CONTEXT THEY MAY BE DAMAGING TO THE DEFENDANT'S CAUSE. IF ADMISSION OF SUCH STATEMENT IS HELD TO BE ERRONEOUS UNDER A STATUTE AND RULE OF EVIDENCE ON A STATE BASIS, SUCH ERROR CAN BE HARMLESS BEYOND A REASONABLE DOUBT.

We acknowledge that the Supreme Court of Ohio determined that the admission of a portion of petitioner's statement to police was error. We note that no constitutional issue is presented herein. Full compliance with the prophylactic rules of Miranda v. Arizona, 384 U.S. 436 (1966) was observed. The simple issue presented below and herein is whether the petitioner's statement (that he went to Cincinnati shortly after the homicide to see his parole officer) was so prejudicial as to warrant reversal of his conviction. Acknowledging that the Supreme Court of Ohio held the admission of the statement to be error based upon state law, we believe such error to be of non-constitutional dimension and to be harmless beyond a reasonable doubt.

As a general rule, where statements of an accused are admissible, the entire conversation is admissible to prove the context of the statement made. Wharton's Criminal Evidence, 13th Edition, Section 694, page 497. As stated in VII Wigmore on Evidence, 3rd Edition, Section 2100, page 493:

> "It is commonly said that the whole of the confession or admission must be taken together; but this obviously leaves unsettled whether it is meant that the prosecution must put it all in at first, or merely

> that the accused may call for or offer the remainder."
> (The author's emphasis)

Continuing on, the writer notes that where the confession contains a mention of another crime committed by the accused:

> ". . . this additional crime would originally not be provable for its own sake; yet under the present principle and that of Section 2115 post the accused's allusion to it in his confession may and must be listened if it is a part of the one entire statement confessing the crime charged at bar."
> Id., at §2100, at pp. 497-498.

The Illinois Supreme Court in People v. Hurry (1943), 52 N.E. 2d 173 stated that

> "The rule seems to be well settled that where a conversation or confession is made by a defendant in the criminal case the entire conversation is admissible and if therein it appears from his own statement that he had committed other crimes, does not amount to proof that another crime had been committed as a substantive fact but is merely proof of the defendant's entire conversation."

A similar result was reached by the Colorado Supreme Court sitting en banc in Graham v. People (Col. 1956), 302 P. 2d 737.

Following full advice and waiver (Miranda v. Arizona, supra.), petitioner gave a statement to police which included his explanation that the trip to Cincinnati (made shortly after the homicide) was to see his parole officer. In context, with the overwhelming proof of petitioner's guilt, any error in admitting that portion of the statement was harmless beyond a reasonable doubt. Chapman v. California (1967), 386 U.S. 18.

It is respectfully submitted that the Writ of Certiorari should not be issued on this question.

III. CONSISTENCY IN THE VERDICT IS NOT REQUIRED BY THE DUE PROCESS CLAUSE AND EACH COUNT IN AN INDICTMENT IS REGARDED AS IF IT WERE A SEPARATE INDICTMENT.

It is well established that "consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." Dunn v. United States (1932), 284 U.S. 390 at 393. See Borum v. United States (1932), 284 U.S. 596; Hamling v. United States, 418 U.S. 87, 101 (1974). See generally, 18 A.L.R. 3d 274 and extensive citation therein.

The law in Ohio has been consistent with this general principle for a number of years. For example, in Griffin v. State (1868), 18 Ohio St. 438 the court characterized an objection to inconsistencies in the jury's finding with respect to separate counts of an indictment as "technical", and continued:

> "[A] technical answer to it is sufficient. As we have already said, the theory of the law is, that each count of the indictment charges a distinct offense; hence it follows, that the finding of the jury as to a particular count is independent of and unaffected by the finding upon another count."
> 18 Ohio St. at 445.

As stated by this Court in Hamling v. United States, supra., at page 101, "It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required.

It is respectfully submitted that no constitutional issue is presented herein and that the Writ of Certiorari should not issue on this question.

IV. SUBSTITUTION OF AN ALTERNATE JUROR FOR A JUROR WHO HAS READ A NEWSPAPER ACCOUNT OF THE CRIMINAL TRIAL PROCEEDINGS DOES NOT COMPROMISE A DEFENDANT'S RIGHT TO A FAIR TRIAL WHERE THE REMAINDER OF THE PANEL AND THE ALTERNATE JUROR HAVE NOT READ THE NEWSPAPER ACCOUNT.

During the weekend following the first week of trial, a local newspaper reported that the victim's daughter had identified petitioner in court as the assailant. In fact, the testimony was given during a voir dire examination of the witness out of the hearing of the jury. At trial, the witness was unable to identify petitioner in court. Petitioner had altered his appearance by dying his hair and changing the style of his hair. The witness did identify a picture of petitioner as being the picture of the assailant which she had identified some days after the crime.

Trial resumed on Monday and the jury was polled by the trial judge as to whether any juror had read the article. One juror and one alternate juror had read the account. No other jurors had read the article nor were they aware of its contents. Both jurors were excused and a second alternate seated.

There is no indication that petitioner's right to a fair trial was compromised. Nothing approaching the circumstances of Sheppard v. Maxwell, 384 U.S. 333 (1966) is presented herein. The trial judge adequately protected the petitioner's right to fair trial by excusing the juror who had read the news article.

It is respectfully submitted that the Writ of Certiorari should not issue on this question.

CONCLUSION

For the reasons advanced in the foregoing brief, it is respectfully submitted that the petition should be granted and judgment vacated only insofar as it leaves undisturbed the death penalty imposed and the case remanded to the Supreme Court of Ohio for further proceedings. Lockett v. Ohio, 430 U.S. _____ (1978).

It is further respectfully submitted that the Writ of Certiorari should not issue on other questions presented herein.

Respectfully submitted,

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